



TRUSTS & ESTATES

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

Awarding attorney fees in fiduciary duty cases

By Lawrence E. Varsek¹ and Roman Okrei²

According to case law, there appears to be an indication that Illinois courts are more willing to impose punitive damages against a person who breaches their fiduciary duty than they were in the past. Additionally, the courts seem to be willing to order as elements of the punitive damages, attorney fees and the costs necessary to prove the claim of the breach of a fiduciary duty in addition to statutory costs.

Often the estate assets held by the fiduciary are used to fund the defense of the wrongful conduct by the fiduciary. The wronged beneficiary may have limited resources with which to fund an attack. If the wronged beneficiary loses, he has to pay not only his attorney fees and costs but is often, in fact, participating in paying of the defense fees and costs as well. Fiduciaries, especially those who have committed transgressions, are well aware of this cold hard fact of life.

In cases involving an egregious breach of a fiduciary duty such as when the fiduciary breaches his duty for personal gain, punitive damages are necessary. Without punitive damages the fiduciary has nothing to lose by attempting to take from the estate. He is, in effect, playing with the estate's assets. If the fiduciary is caught, all he would have to do is pay back to the estate what he took. Without punitive damage the worst that would happen would be that he would forfeit his commission and be surcharged for part of his own attorney fees. Without a penalty there is no deterrent to breaching a fiduciary duty.

Punitive Damages

A leading Illinois case regarding the imposition of punitive damages for breach of fiduciary

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Ethics corner: Courtesy or controversy— Drafting attorney reserved power to amend or revoke client's trust

By Don L. Shriver¹

For those of you who might wish to deviate from the more customary provisions of estate documents, be more innovative in drafting documents, or have a close relationship with your client(s) I would suggest reading *Dunn v. Patterson*, decided by the Third District in November, 2009, 335 Ill Dec 685, 919 N.E.2d 404, _ Ill App 3d _.

In June, 2006, Defendant, "Patterson" (a trust and estate attorney), was hired by the Plaintiffs, "Dunn" to prepare a joint trust, living will and

ancillary estate planning documents. However, this was no typical estate plan. Each instrument (will, living trust, powers of attorney) had a "Qualified Right to Amend and/or Revoke" which prohibited the amendment or revocation of that instrument without the "written consent of Patterson or by order of the court." Five months later Patterson received a letter from another attorney stating the Dunns no longer wanted Patterson to solely have the Qualified

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Awarding attorney fees in fiduciary duty cases

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duty is the *Estate of Wernick*, 127 Ill.2d 61, 525 N.E.2d 876 (1989). In *Wernick* the plaintiff's decedent and the defendant were longtime friends and business associates investing in real estate together. The decedent handled the partnership's accounting matters and practiced medicine, and the defendant handled the other business matters and practiced law. The decedent became terminally ill. Arrangements were made by the two partners for the defendant to buy out the interests of the decedent. The Supreme Court ultimately affirmed that the defendant owed a fiduciary duty to the decedent and that that duty was breached. What were the facts that warranted a finding of a breach of a fiduciary duty?

In *Wernick* the defendant purchased the property from the decedent prior to his death at substantially less than it was worth. He then resold the property retaining the proceeds of sale for his own benefit. He also delayed in repaying a promissory note he gave the decedent in exchange for the title to the property. The *Wernick* case held that punitive damages were appropriate and the costs of litigation, including attorney fees, were an element of punitive damages to be considered.

The Supreme Court in *Wernick* recited the fundamental law of punitive damages and stated: "the purpose of punitive damages is twofold: to punish the wrongdoer and to deter the particular wrongdoer as well as others from committing similar attacks in the future." IPI 35.01 uses similar language when it instructs juries, "in addition to any other damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter the defendant and others from similar conduct."

The *Wernick* court points out that punitive damages may be awarded in cases where the wrongful act complained of is characterized by wantonness, malice, oppression or other circumstances of aggravation. The court makes note of the fact that the pattern of conduct by the defendant was from the inception motivated by more than mere ignorance or oversight but by personal gain.

In *Wernick* the Supreme Court cited with favor the case of *Glass v. Burkett*, 64 Ill.App.3d 676 381 N.E.2d 821 (1978), referred to below, and quoted the favor the following of *Glass*:

...the defendant's conduct was intentional, was not in good faith, and was performed with full knowledge that the loss to his client would be to his gain.

Another case involving the breach of a fiduciary duty is *In re: Estate of Hoellen, a disabled person, v. Donald L. Owsley*, 367 Ill. App.3d 240, 854 N.E.2d 774, 305 Ill.Dec. 182 (1st Dist. 2006).

In *Hoellen* a police officer gained the trust of an 89 year old senior citizen. The police officer made himself the beneficiary of the senior citizen's assets. Someone blew the whistle, a public guardian was appointed, and the police officer was served with a citation through probate court proceedings. An order was issued returning assets that were transferred, removing the police officer's name from any powers of attorney that were signed, and removing him as a beneficiary of any trusts and wills that the 89 year old had. Additionally, the trial court entered \$1 in nominal damages and \$50,000 in punitive damages. The appellate court affirmed and stated:

We conclude that the probate court did not error in finding that respondent's conduct justified an award for punitive damages where he used his position as a Chicago Police Officer to gain Hoellen's trust and confidence, exert undue influence over him and then flagrantly and intentionally breach the fiduciary duty that he owed him.

Reimbursement of Petitioner's Costs of Litigation and Attorney Fees

The case of *Glass v. Burkett*, 64 Ill.App.3d 676, 381 N.E.2d 821 (1978), stands for the proposition that under certain circumstances attorney fee can be considered as one element of punitive damages. As stated above in *Glass*, a realtor was found to be in violation of his fiduciary duties when he steered potential buyers away so that he could purchase the property for himself and resell it at a considerable profit. The court found that the concealment by the realtor of potential purchasers was intentional, not in good faith

and intended to be for his personal gain. It concluded that the conduct fulfilled the requirement of aggravated circumstances so as to warrant punitive damages. The *Glass* court concluded that under the circumstances it was not an abuse of the trial court's discretion to award attorney fees as an element of punitive damages. The court stated,

Wrongful conduct of the defendant which has been characterized as being either willful, wanton, malicious, or oppressive is the root of all cases where litigation expenses have been allowed as an exception to the general rule that litigation expenses are not allowable to the successful party in the absence of a statute or in the absence of some agreement or stipulation specifically authorizing them.

64 Ill.App.3d at 683.

In Re: Estate of Thomas Talty, 376 Ill.App.3d 1082, 877 N.E.2d 1195, 315 Ill.Dec. 866, petition for cert denied at 226 Ill.2d 615, 882 N.E.2d 77, 317 Ill.Dec. 503 (2008), stands as a warning to those executors, administrators and guardians who choose to benefit themselves disregarding their obligations to those they are appointed to protect. For attorneys, it provides an outline of potential theories of recovery for breach of fiduciary duty including the recovery of attorney fees and costs of litigation.

The will of Thomas Talty was admitted to probate in Will County, and his brother, William, was appointed executor. Thomas' widow was his only heir and the only residuary beneficiary under the will. Thomas and William each owned 50 percent of the stock of an auto dealership and were also 50/50 co-owners of the building and acreage in which the business was located. The brothers had also entered into a stock redemption agreement which provided that the surviving brother had the option to purchase the deceased brother's shares at market value as determined by appraisal. A similar provision was provided as to the land.

William Talty wore three hats. As executor he was the seller. William Talty, as the surviving partner, was the buyer. Pursuant to the stock redemption agreement, William was the person who could determine the sale price by appraisal.

William hired an accountant, his cousin, to appraise the business. He valued Thomas' 50 percent interest in the business. The widow became aware of the pending sale by her brother-in-law to himself and attempted to enjoin the transfer. The court refused the injunction on the grounds that she had a suit for damages as an adequate remedy at law. The sale of the business and the sale of the real estate to William was completed. Shortly thereafter a supplemental proceeding alleging breach of fiduciary duty was filed.

After litigation commenced, William had his appraisal reduced by 50 percent in a new appraisal. On cross-examination the accountant testified that he reduced the appraisal at the request of William Talty. The trial court found the real estate appraiser hired by William "to be the worst expert witness the court had heard in 28 years on the bench."

William Talty testified that he did not consult with the widow or keep her advised even though she was the only residuary legatee. On the stand he repeatedly stated, "the agreement did not require it."

During the course of the litigation William obtained a second appraisal which was more favorable to the widow's position. He secreted this appraisal for over two years repeatedly denying its existence in requests to admit, interrogatories and at his deposition. The appraisal was turned over to plaintiff's counsel as soon as his new attorney became aware of it.

The trial court found that William failed in his duty of full disclosure to the widow and that the failure to disclose gave rise to an interference of bad faith. William failed to disclose the second appraisal, used a real estate appraiser that he knew, or reasonably should have known, was not qualified, and participated with his cousin in revising the business appraisal to his own advantage. The trial court ordered that William pay to the petitioner her attorney fees, litigation costs and expert witness fees as punitive damages. The Appellate Court affirmed and the Supreme Court denied a petition for leave to appeal.

Conclusion

Since 1978 in the case of *Glass v. Burkett*, and to date with *In re: Talty*, Illinois courts have made clear that they will enter an award against a person who breaches his fiduciary duty when that person benefits from the breach and causes harm to the party or parties to which they owe a fiduciary duty. The imposition of punitive damages created a real deterrent to such breaches and awarding attorney fees and litigation costs to the prevailing party will likely act as an additional deterrent. ■

1. Lawrence ("Larry") Varsek may be reached at (815) 744-3323 or at Kesrav@aol.com. Larry is a member of the ISBA Trusts & Estates Section Council.

2. Roman Okrei may be reached at (815) 834-9410.

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OFFICE

Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

EDITOR

Katarinna McBride
161 N. Clark St., Ste. 2600
Chicago, IL 60601-3221

**MANAGING EDITOR/
PRODUCTION**

Katie Underwood
kunderwood@isba.org

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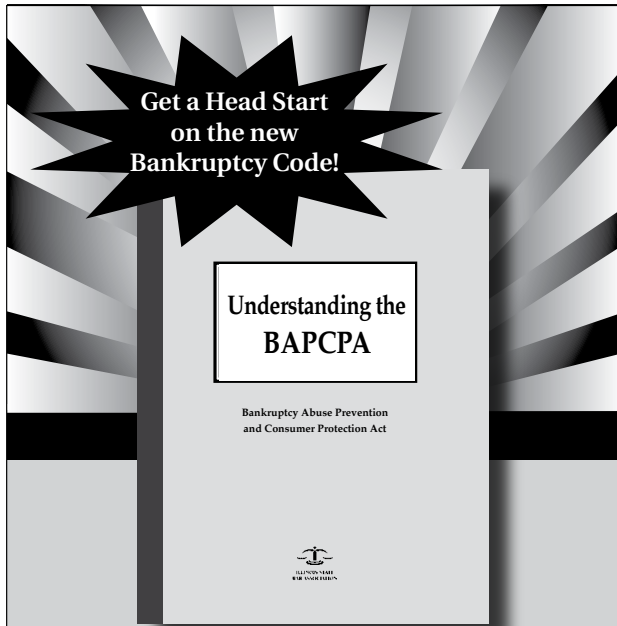
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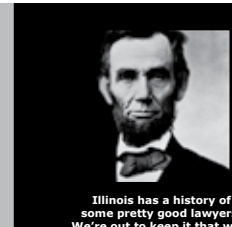
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Courtesy or controversy—Drafting attorney reserved power to amend or revoke client’s trust

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Right and that it should be removed from the instruments. Patterson responded that he would like to meet with the Dunns personally to determine if this was consistent with their original plan. If they refused to meet, Patterson stated the Dunns would need to petition the Court.

The Dunns sought an immediate Declaratory Judgment stating that they had an unfettered right to amend and Patterson must abide by their wishes under Rule 1.2(a) of the Rules of Professional Conduct (134 Ill.2d R. 1.2(a)). Patterson vigorously defended and cited, as part of his defense, to Rules 1.14(a) and (b) (134 Ill.2d Rs. 1.14(a) and (b)) because he believed that Mrs. Dunn’s mental status may have been impaired. The Dunns also filed a Rule 137 motion for sanctions claiming “a reasonable attorney would not have adopted and forwarded the arguments presented by defendant.” The trial court found for the Dunns and sanctioned Patterson in the amount of the Dunn’s legal fees and costs. Patterson appealed. The appellate court reversed and remanded.

Patterson relied on sections of Restatement (Third) of Trusts § 63(1) and comment j to § 63(3) which approves the concept of having a third party consent for the exercise of the amendment or revocation power in trusts. The Dunns acknowledged this but argued that an attorney is held to a higher standard and under Rule 1.2, because public policy requires an attorney to follow the direction of its clients.

The court distinguished *Sherman v. Klopper*, 32 Ill App.3d 519,336 N.E.219 (1975) since in that case the attorney failed to adequately inform the client that he stood to benefit from the transaction. The court agreed with Patterson that the consent was “consistent with the broad fiduciary duties an attorney owes, ... which is based on duties of loyalty and trust” and the court accepted Patterson’s argument that even though he may be discharged as the Dunns’ attorney, this would not limit his role to approve or deny the “consent on a good-faith basis.” The court specifically noted that Patterson had no beneficial interests and had no relationship with any other family members.

Furthermore, the court commented that their decision might be different if the draft-

ing attorney was a metropolitan or urban attorney rather than a rural practitioner. The court stated:

Out here in the cornfields of Illinois and, we suspect, sometimes in the large metropolitan areas of Illinois, one’s lawyer is often his or her most trusted friend and advisor with respect to major life decisions. Where, as here, the lawyer is given no financial stake in an estate by virtue of his capacity as a fiduciary, we see no reason why the family lawyer cannot act in such capacity simply because he is drafting a trust document.

Finally, the court reversed the sanctions. After citing Rule 137, the court found that there was nothing unreasonable about Patterson’s conduct either in drafting the docu-

ments or later when his consent was brought into question. The court did not delineate what “pleading, motion or other paper” was claimed to be in violation of the Rule.

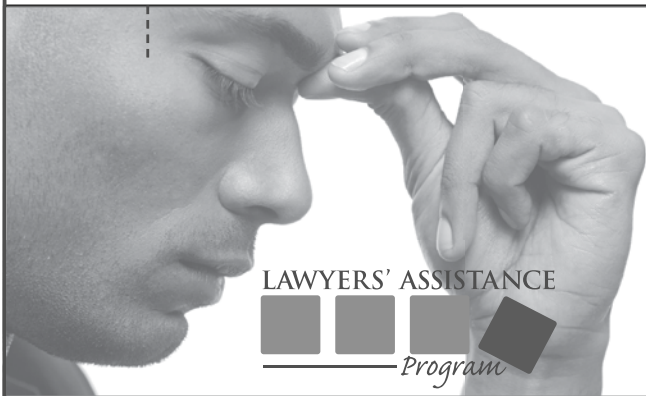
The court concluded:

We do not find Patterson’s conduct sanctionable. Rather, we find it admirable and consistent with the highest ideals of the bar.

If you are practicing in the “cornfields” of Illinois, the close relationship you have with your clients may be ample explanation for some uncustomary fiduciary relationships, which may or may not fly in the big city. ■

1. Donald L. Shriver, Law Offices of Shriver, O’Neill & Thompson and his offices are located at 515 North Court Street Rockford, Illinois 61103-6807. You may call him at 815-963-4895.

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Thursday, 4/8/10- Webcast—Durable Powers of Attorney. Presented by the Illinois State Bar Association. <<https://isba.fastcle.com/store/seminar/seminar.php?seminar=3564>>. 12-1.

Thursday, 4/8/10- Springfield, INB Building 307 E. Jackson. Key Issues in Local Government Law: A Look at FOIA, OMA, Elections and Attorney Conflicts. Presented by the ISBA Local Government Law Section & the ISBA Standing Committee on Government Lawyers. 12:30-4:45. Cap 55

Thursday, 4/8/10- Chicago, ISBA Regional Office—Resolving Financial Issues in Family Law Cases. Presented by the ISBA Family Law Section. 8:30-4:30.

Friday, 4/9/10- Chicago, ISBA Regional Office—Civil Practice Update- 2010. Presented by the ISBA Civil Practice Section. 9-4.

Monday - Friday, 4/12/10 - 4/16/10 – Chicago, ISBA Regional Office—40 hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

Friday, 4/16/10- Chicago, ISBA Regional Office—Legal Trends for Non-Techies: Topics, Trends, and Tips to Help Your Practice. Presented by the ISBA Committee on Legal Technology ; co-sponsored by the ISBA Elder Law Section. 1-4:30 p.m.

Saturday, 4/17/10 – Lombard, Lindner Learning Center—DUI, Traffic, and Secretary of State Related Issues- 2010. Presented by the ISBA Traffic Law Section. 9-4. Cap 250.

Tuesday, 4/20/10- Bloomington, Double Tree Hotel—Intellectual Property Coun-

sel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30. Cap 80.

Wednesday, 4/21/10- Bloomington, Double Tree Hotel—Construction Law- What's New in 2010? Presented by the ISBA Special Committee on Construction Law; co-sponsored by the ISBA Special Committee on Real Estate Law. 9-4. Cap 80.

Friday, 4/23/10- Champaign, I- Hotel and Conference Center—Practice Tips & Pointers on Child-Related Issues. Presented by the ISBA Child Law Section; co-sponsored by the ISBA Family Law Section. 8:25-4. Cap 70.

Tuesday, 4/27/10- Chicago, ISBA Regional Office—Construction Law- What's New in 2010? Presented by the ISBA Special Committee on Construction Law. 9-4.

Wednesday, 4/28/10- Chicago, ISBA Regional Office—Intellectual Property Counsel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30.

Thursday, 4/29/10- Chicago, ISBA Regional Office—Key Issues in Local Government Law: A Look at FOIA, OMA, Elections and Attorney Conflicts. Presented by the ISBA Local Government Law Section & the ISBA Standing Committee on Government Lawyers. 12:30-4:45.

Friday, 4/30/10- Chicago, ISBA Regional Office—Anatomy of a Trial. Presented by the ISBA Tort Law Section. Time TBD.

May

Tuesday, 5/4/10- Chicago, ISBA Regional Office—Boot Camp- Basic Estate Planning. Presented by the ISBA Trust and Estates Section. 9-4.

Wednesday, 5/5/10- Chicago, ISBA Regional Office—Price Discrimination: Dead or Alive? Robinson Patman after Feesers. Presented by the ISBA Antitrust Section. 12-2pm.

Wednesday, 5/5/10- Chicago, The Stan-

dard Club—Tips of the Trade: A Federal Civil Practice Seminar. Presented by the ISBA Federal Civil Practice Section. 9-4:30.

Thursday, 5/6/10 – Chicago, ISBA Regional Office—Law Practice Strategies to Weather a Stormy Economy. Master Series Presented by the Illinois State Bar Association. 8:30-12:45.

Friday, 5/7/10 – Bloomington, Bloomington-Normal Marriott—Law Practice Strategies to Weather a Stormy Economy. Master Series Presented by the Illinois State Bar Association. 8:30- 12:45. Cap 130.

Friday, 5/7/10- Bloomington, Bloomington-Normal Marriott—DUI, Traffic and Secretary of State Related Issues-2010. Presented by the ISBA Traffic Laws/ Courts Section. Time TBD. Cap 125.

Wednesday, 5/12/10- Chicago, ISBA Regional Office—Mental Health Treatment in Illinois: Time for a Change. Presented by the ISBA Committee on Mental Health Law. Time TBD.

Thursday, 5/13/10- Friday, 5/14/10- Chicago, ISBA Regional Office—2010 Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. 8:30-5; 8:30-12:15.

Friday, 5/14/10- Chicago, ISBA Regional Office—Legal Ethics in Corporate Law. Presented by the ISBA Corporate Law Department Section. 1-5:15.

Thursday, 5/20/10- Bloomington, Hawthorn Suites—Resolving Financial Issues in Family Law Cases. Presented by the ISBA Family Law Section. 8:30-4:30.

Friday, 5/21/10- Chicago, ISBA Regional Office—2010 Labor and Employment Litigation Update. Presented by the ISBA Labor and Employment Section. 9-12:30.

June

Friday, 6/11/10- Live Webcast—Second Annual Animal Law Conference. Presented by the ISBA Animal Law Section. 8-5. ■

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